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No. 86-792

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEOPOLD KOPPEL AND PAUL KOPPEL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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14 pp.

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INTRODUCTION

Petitioners submit that the government's arguments in opposition to the petition for certiorari demonstrate the importance of the three questions presented. Without fully realizing it, the United States implicitly concedes that the trial judge gave an instruction *sua sponte* to which defense counsel immediately objected and that this instruction directed a verdict on at least one element of the offense charged. Yet, the government argues that such an instruction is constitutionally permissible.

The United States also argues that it is permissible for a prosecutor to deliberately violate a district court order requiring him to disclose the names of witnesses who have given certain statements if the prosecutor, on his own without disclosure to the district court, decides that a jury would disbelieve the witnesses. Apparently, the United States argues that the prosecutor may also mislead the defendants into believing that he complied with the court's order and may deceive defendants so that they believe that witnesses—who in actuality state that, if called to testify, they would swear that they did not see what the government alleged—are favorable to the government.

Finally, the United States argues that where a grand jury uses felony language in one count of an indictment, abandons that language in a second count, and substitutes language that charges a misdemeanor, a trial judge may construe the indictment as a felony. Moreover, the government contends that a trial judge may treat a guilty verdict as a felony conviction without even charging the petit jury on the elements required for a felony.

Each of the government's positions is in conflict with landmark decisions of this Court.

ARGUMENT

A. The Trial Judge's Instruction to the Jury Effectively Directed a Verdict Against the Petitioners

After instructing the jury on the elements of Count 2, the trial judge gave an instruction which contained language that the judge added *sua sponte*, without previously warning counsel that such a charge would be given. The instuction was as follows:

> "I charge you, which is simple common sense, that picking meat up off the floor and placing it in somebody's pocket is not a violation of any kind. *Taking it our of their pocket later and putting it in an edible*

meat container, that is." (J.A. 843) (Emphasis added).

The italicized portion represents the part added by the judge, and its intent and meaning are clear. The judge told the jury that taking meat that had fallen on the floor, putting it in a pocket, and placing it in an edible container is an offense. On appeal, the government conceded that this was the meaning of the instruction, arguing that the instruction "appears to be simply a matter of 'common sense' at least in the context of this case." Brief for the United States, at 28.

The instruction is not common sense, however. It was wrong as a matter of law and it compelled the jury to convict rather than to find facts. To convict the defendants, the jury had to find that meat which was contaminated was sold, offered for sale, or transported in commerce. Whether a piece of meat that had fallen on the floor was actually dirty was a fact question for the jury. Yet, the court's charge removed this element from the case. That a reasonable jury would have taken the instruction as removing the element from its consideration is best demonstrated by the fact that in its Brief in Opposition, the United States reads the instruction that way. It states that "the court did no more than instruct the jury that meat picked up from the floor was filthy and could not be placed directly (i.e., without proper conditioning) into an edible meat container." Whether any given piece of meat was filthy was a jury question, however, and the United States conceded that the jury was directed that the court had resolved the question for it.

Moreover, the United States does not dispute the fact that the trial judge never instructed the jury on the meaning of "transport." Nor does the government dispute the fact that the defendants sought the instruction that picking meat up off the floor and putting it in a pocket is not an offense to clarify what the indictment charged. When the

judge added his *sua sponte* language to the charge, the jurors also may have understood that he was instructing them that transport—i.e., the carrying away of meat—which was another element of the offense, had been established. This too is undisputed by the United States.

The government's only response to the argument that the trial judge directed a verdict with respect to transportation is to say that petitioners failed to raise this claim below. But, nothing could be further from the truth. This was at the heart of petitioner's argument that the *sua sponte* instruction was the equivalent of a directed verdict. From the moment the instruction was given, the petitioners objected that it had the effect of directing a verdict. This was their argument in both the district court and in the court of appeals. Petitioners explained the harm attributable to the *sua sponte* instruction as follows in the court of appeals:

> "The trial court gave no other instruction on the definition of transport as used in the indictment. After the jury retired to deliberate, it asked to have the testimony of various witnesses reread insofar as it related to Paul Koppel. These witnesses testified concerning picking meat up of [sic] the floor. Such testimony also was prominent in the case the government tried to make against Leo Kopppel and was emphasized by the prosecutor in closing argument. The jury's request indicated that it focused on the court's *sua sponte* charge, probably believing that the trial judge had explained to them an example of "transport." As noted in the Koppels' opening brief, there was never any question that meat that had fallen on the floor had been placed in edible containers. That was permissible according to all the witnesses, but the trial court refused to correct its erroneous instruction. The jury's verdict presumably reflected its judgment that the Koppels had placed meat in edible containers after it had fallen on the floor. Had the jury been properly instructed, it might well have acquitted on Count 2 as it acquitted on Count 1."

Reply Brief for Appellants, at 6-7.

The effect of the trial judge's instruction was to remove from the jury at least one and probably two critical elements of the case and thus to violate *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and *Connecticut* v. *Johnson*, 460 U.S. 73 (1983). In view of the fact that the Brief in Opposition implicity concedes that one of the elements—that meat was, in fact, adulterated—was removed from the jury, and apparently does not quarrel with the substance of the argument petitioners make with respect to the effect of the instruction on the element of transportation, the Court would be warranted in summarily reversing petitioners' convictions and remanding for a new trial.

B. The Prosecutor's Deliberate Violation of a Court Order and Concealment of Evidence Denied the Petitioners a Fair Trial

The United States concedes, as it must, that the trial judge required the prosecutor to provide the defendants before trial with the names of all petitioners' former employees interviewed by the government who stated that they did not observe petitioners engaged in the unlawful activities charged in the indictment. Only after trial did petitioners learn that two witnesses, Cook and Skottke, were interviewed personally by the prosecutor just one week before trial, and each stated that he had not observed any unlawful acts. Both of these witnesses submitted affidavits describing their interviews. (J.A. 861-864) Cook swore that he told the prosecutor that he did not see the acts alleged and that he explained to the prosecutor that one of the petitioners had removed meat from a "bone cart" not for impermissible purposes, as the government alleged, but to educate a trimmer on the proper boning procedure. (*Id.* at 861) Cook also swore that he had told the government's investigator a year earlier that he had not seen the alleged acts. (*Id.*) Skottke

gave similar information to the prosecutor and also told him that the notes of an inspector concerning an earlier interview with him were incorrect. (*Id.* at 863)

The trial judge held two post-trial hearings at which the government was given an opportunity to challenge the truthfulness of the affidavits. At no point did the government seek to do so. It has accepted Cook's and Skottke's affidavits. These affidavits plainly establish that the two witnesses were former employees who told the prosecutor they did not see the alleged acts. Yet, the prosecutor did not disclose to the petitioners the fact that these witnesses would swear that they never saw what other employees alleged to be true. Instead, the prosecutor issued government subpoenas for these witnesses and provided the petitioners with an agents' notes that suggested that the witnesses would be inculpatory, knowing all the time that the witnesses were exculpatory and denied ever telling the agent what the notes suggested.[1]

The prosecutor conceded in the trial court that he made a deliberate decision not to disclose to the petitioners that Cook and Skottke would give favorable testimony for the defense. His only explanation was that notes prepared by an agent, but not adopted by either witness, could have been used as impeachment. Without seeking a ruling from the Court, the prosecutor acted to lead the petitioners to believe that Cook and Skottke were inculpatory

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[1] The petitioners did not learn what the government had done until after the trial ended. They filed a post-trial motion for a new trial, alleging newly discovered evidence of a constitutional violation and a violation of the court's order. Although the government originally argued in the district court that the motion was not timely, it abandoned the argument of appeal and addressed only the merits. Brief for the United States, at 32-35. Thus, the timing issue was abandoned, as the United States accepted the fact that petitioners filed their motion upon discovery of the facts alleged in support of their suppression claim.

witnesses, when the prosecutor knew they were important witnesses for the defendant.

The petitioners explained the importance of these witnesses to the trial judge and to the court of appeals. In its opening brief in the court of appeals, for instance, the petitioners argued as follows:

> "The government's letter of April 8, 1986 listed the names of ten persons. The government represented that these names were submitted pursuant to the pretrial order. In fact, the Government not only suppressed the names of Cook and Skottke, but it also misled the defense by supplying names of individuals who had never worked at the Fort Plain Packing Co. during the relevant time period.
>
> "Fred Yager, Elmer Fields, Steve Doucet, Gunther Kadur, and Thomas Weaver, who were listed in the Government's letter, never worked for the defendants during the period charged in the indictment. (J.A. 875) Thus, half the people listed by the Government could not possibly have had relevant information concerning this case.
>
> "Floyd Brand, who was listed, worked for the defendants in the plant for only a short period. He was a maintenancce man and a laborer who cleaned up and did all around work. He was in no position to rebut the testimony of the witnesses who worked in the boning room or on the kill floor. Mary Keba worked for the most part in packing and was not in a position to rebut the testimony of witnesses who worked in the boning room or on the kill floor. Linda Hudson was an office manager who on occasion would work in the plant, but she was not in a position to rebut the testimony of witnesses who worked in the boning room or on the kill floor. (Defendants' June 23, 1986 Memorandum, at 5; J.A. 874)
>
> "The only two witnesses whose names the government listed and who were in a position to see the things alleged by government witnesses were Leon Engles, who worked in the boning room, and William Battisti, who worked on the kill floor. In deciding not

> to call these witnesses, the defendants acted in the belief that the government had represented that no one else whom it had interviewed had corroborated these individuals in their claim that they saw no improprieties. Rather than call these witnesses and risk having the government argue that they were friendly to the defendants and/or that they were uncorroborated, the defendants focused exclusive attention instead on eliciting evidence concerning the bias and hostility of the employees who testified for the government.[2]
>
> "Had the government revealed that Mr. Skottke and Mr. Cook, who were in a position to see many of the things testified to by the government witnesses, had denied seeing the defendants pick up meat and put it in edible containers and had denied that the defendants turned off sterilizers, the defendants would have known that they had corroborative testimony available. *More importantly, both Skottke and Cook had previously complained about the defendants' conduct, and they were no friends of the defendants.* Thus, their testimony would have been critical to the defense."

Brief for Petitioners, at 34-36.

The government did not dispute this argument, except to say in a single footnote, Brief for the United States, at 35, that in its view the petitioners' trial strategy was different. The government has not challenged the petitioners' claim that these two witnesses, Cook and Skot-

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[2] The trial judge observed that it is possible that Cook and Skottke would not have seen every act that occurred. But, the importance of their testimony is that it would have corroborated Dean and other witnesses who also did not see acts which some witnesses claimed to have seen. The prosecutor referred often to the twelve employee-witnesses he presented and referred to them as "star" witnesses. *E.g.*, J.A. 759-60. It was vital to the defense that it have a fair chance to show that a number of witnesses, including some who had been extremely hostile to the defendants, denied seeing the acts alleged by other employees.

tke, worked in positions that made them especially valuable defense witnesses.

Surely, the prosecutor violated duties imposed by this Court's decisions in *United States* v. *Agurs*, 427 U.S. 97 (1976), and *United States* v. *Bagley*, 473 U.S. ____, 105 S.Ct. 3375 (1985). The prosecutor's conduct involved both suppression of evidence and deception; it violated due process and the trial court's order. By granting certiorari and addressing this conduct, the Court can clarify the duty owed by federal prosecutors to the court and to defendants who rely upon government representations.

C. The Lower Courts Substituted A Felony Charge for the Misdemeanor Actually Charged by the Grand Jury and thus Violated the Fifth Amendment

The government does not dispute that the grand jury in the first count of its indictment used the language "distribute" and "attempt to distribute" that is required to charge a felony under 21 U.S.C. § 676(a), and that the same jury decided not to use this language in the second count of the indictment. Instead, the grand jury charged that the defendants either sold, attempted to sell, or transported meat. Surely not every transportation of a good is an attempted distribution, and the government does not argue to the contrary. Instead, it claims that the grand jury indictment was the "functional equivalent" of a felony charge. This claim substitutes trial judges and prosecutors for the grand jury.

A grand jury that wanted to charge a misdemeanor would do what the grand jury did in this case: avoid the felony language and use other language. But, the United States now asserts, without support in any case law, that even if the grand jury uses misdemeanor language, the government is entitled to ask a trial judge to construe the indictment as a felony. Not only does this argument fly in the face of this Court's holdings in *United States* v. *Miller*,

471 U.S. 130 (1985), and *Stirone* v. *United States*, 361 U.S. 212 (1960)[3], but it also is particularly shocking in view of the fact that the prosecutor never asked the trial judge to instruct the jury that it must find that the petitioners distributed or attempted to distribute anything. Thus, the government's position before this Court is that the language used by the grand jury, which is misdemeanor language, can be disregarded and convictions can be deemed to be felonies even though the jury never addressed the element that must be proved to enhance a misdemeanor into a felony under 21 U.S.C. § 676(a).

By granting certiorari and addressing this question, the Court can clarify for the United States the respective roles of grand jury, trial judge, petit jury and prosecutor.

CONCLUSION

Petitioners respectfully submit that all three of the issues presented warrant review by this Court and require reversal of their convictions. Each issue concerns fundamental aspects of the federal criminal justice system. Petitioners ask that the Court reach the merits of their claims.

Respectfully Submitted,

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[3] Petitioners' Reply Brief in the court of appeals offered an Appendix that showed that every lower court that petitioners found that had dealt with similar language in indictments or informations had treated the language as charging a misdemeanor. The United States has offered no cases to the contrary.